UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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VIACOM INTERNATIONAL, INC., COMEDY PARTNERS, COUNTY MUSIC TELEVISION, INC., PARAMOUNT PICTURES CORPORATION, and BLACK ENTERTAINMENT TELEVISION, LLC,

Plaintiffs,

vs. No. 07-CV-2203

YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE, INC.,

Defendants.

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THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED, BOURNE CO., et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs. No. 07-CV-3582

YOUTUBE, INC., YOUTUBE, LLC, and GOOGLE, INC.,

Defendants.

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HIGHLY CONFIDENTIAL

VIDEOTAPED DEPOSITION OF DAVID DRUMMOND

SAN FRANCISCO, CALIFORNIA

THURSDAY, FEBRUARY 12, 2009

Job No.: 16392

DAVID DRUMMOND

FEBRUARY 12, 2009

9:16 A.M.

HIGHLY CONFIDENTIAL VIDEOTAPED DEPOSITION OF DAVID DRUMMOND, at SHEARMAN & STERLING, LLP 525 Market Street, Suite 1500, San Francisco, California, pursuant to notice, before me, KATHERINE E. LAUSTER, CLR, CRR, RPR, CSR License No. 1894.

DAVID DRUMMOND

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Also Present:

CATHERINE LACAVERA, Google

STUART PETTIGREW, Videographer

10:11:10 Suisse, First Boston?

10:11:12 A. Yes.

10:11:13 Q. And George Boutros headed -- was the head banker?

10:11:15

10:11:16 A. Yes, that's true.

10:11:17 Q. And he had a partner named Storm Duncan, who worked with you as well?

10:11:19

10:11:22 A. Yes.

10:11:22 Q. And have they been your long-standing M&A advisors with Google?

10:11:27

10:11:29 A. I'm not sure it's accurate to call them "long-standing." We haven't used bankers for many M&A transactions, but we have used them twice.

10:11:31

10:11:36

10:11:40 Q. What other deal did you use them on?

10:11:43 A. The DoubleClick transaction.

10:11:44 Q. And did they render advice to the Google board of directors in connection with the YouTube acquisition?

10:11:47

10:11:50

10:11:51 A. They rendered a fairness opinion.

10:11:54 Q. Okay. Did they also address the board?

10:11:56 A. In the context of delivering that fairness opinion, yes, I believe they did.

10:11:59

10:12:01 Q. And did they prepare a book for distribution to the board?

10:12:02

10:12:04 A. I believe that they did.

10:12:05 Q. Now, so the ladies and gentlemen of the jury can understand, would you tell them what a -- a fairness opinion is?

10:12:14 A. Well, my understanding of a fairness opinion is a -- an opinion rendered by a financial expert or a firm experienced in financial matters, such as an investment bank, rendering an opinion as to the -- the fairness to the shareholders of -- of an acquisition from a financial point of view.

10:12:40 Q. And prior to rendering that opinion, is it your understanding that the investment bank performs analytical analysis in connection with the acquisition?

10:12:53 A. Yes, it is.

10:12:54 Q. Now, you personally approached YouTube in the first instance; is that correct?

10:13:01 A. In the round of conversations that ultimately led to the acquisition, that's true.

10:13:06 Q. Now, when the negotiations began, whose idea was it within Google to approach YouTube?

10:13:16 A. I don't recall whether the idea started with any particular individual. I know I and some others thought that -- that it was a -- a worthwhile

10:17:39 Q. So it's your recollection that this was a
10:17:41 pricing issue, as far as he was concerned? It was
10:17:44 too expensive?
10:17:45 A. (No audible response.)
10:17:46 Q. An acquisition of YouTube would be too
10:17:48 expensive?
10:17:49 A. I -- I recall him having concerns about a
10:17:52 price.
10:17:52 Q. And no other concerns?
10:17:54 A. I don't remember what other concerns he
10:17:56 might have had.
10:17:57 Q. Now -- now, is it fair to say that your
10:18:52 initial offer to YouTube was in the range of
10:18:56 $615 million?
10:19:00 A. Yes, I think that's correct.
10:19:02 Q. And the final offer added a billion
10:19:07 dollars to that, basically?
10:19:09 A. Yes.
10:19:10 Q. Now, I take it that the acquisition was
10:19:16 embodied in a merger agreement?
10:19:18 A. Yes, that's correct.
10:19:20 MR. BASKIN: And let me show you, just so
10:19:22 we're working off the same page what we'll mark as
10:19:39 Drummond 2.

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(Drummond Exhibit Number 2 was marked for identification.)

MR. BASKIN: I think that's about as many as we've got.

BY MR. BASKIN:

Q. Is that a copy of the merger agreement, Mr. Drummond?

A. It appears to be.

Q. And did you work on the acq- -- negotiation of the merger agreement?

A. Yes, I did.

Q. How about the scrivening of the merger agreement? Did you work on the scrivening of the merger agreement?

MR. SCHAPIRO: You might define "scrivening" for the ladies and gentlemen of the jury.

BY MR. BASKIN:

Q. Do you know what "scrivening" means, Mr. Drummond?

A. Yes.

Q. Did you work on the scrivening of the merger agreement?

A. I didn't actually write the language, if

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10:20:40 that's what you mean, but I was -- certainly
10:20:42 reviewed drafts, and reviewed provisions, and was
10:20:45 asked to comment on them.
10:20:46 Q. Now, before you entered into this
10:20:49 agreement, and before you submitted the transaction
10:20:53 to your board for its approval, would I be correct
10:20:57 that Google performed a due diligence investigation
10:21:00 of YouTube's operations and financing conditions?
10:21:03 A. Yes, that's true.
10:21:04 Q. And that's customary, isn't it, to perform
10:21:07 a due diligence?
10:21:08 A. Yes.
10:21:09 Q. And maybe you could tell the ladies and
10:21:10 gentlemen of the jury what a due diligence is.
10:21:15 A. Well, a due diligence investigation is
10:21:18 generally what a company will do when they're
10:21:22 attempting -- when you're going to invest the
10:21:25 company funds, or, for instance, in acquiring a
10:21:29 company, to review the -- the asset that you're
10:21:32 buying, the company that you're buying, and try to
10:21:35 understand its -- its business, and whether or not
10:21:42 it's worth some particular amount of money that is
10:21:45 proposed to be paid for it.
10:21:48 Q. And it is generally your practice -- your

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experience that the target company makes available to the would-be acquirer the information the would-be acquirer wants to see?

A. Yes, that's my understanding.

Q. And is it fair to say that's what happened here as well?

A. Yes, that's correct.

Q. And prior to the acquisition, did you -- strike that.

Were a large array of documents set up in what might be characterized as a war room?

A. (No audible response.)

Q. Or would you -- would you use a different phrase?

A. I don't -- I don't recall the -- the actual venue, or how things were set up. I know that they -- we spent a fair bit of time at Wilson Son- -- Sonsini, both negotiating the transaction and -- and review -- you know, performing due diligence.

Q. And did you have access to the senior executives of YouTube to ask them questions?

A. Yes, we did.

Q. And did you do that from time to time in

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10:22:52 the course of the due diligence?

10:22:53 A. Yes, we did.

10:22:54 Q. And in connection with that, do you recall

10:22:57 any question you asked them that they refused to

10:22:59 answer?

10:23:01 A. No, I don't.

10:23:02 Q. Do you recall -- strike that.

10:23:04 Who else, other than -- I take it you

10:23:06 weren't doing all the due diligence yourself?

10:23:09 A. That's correct.

10:23:09 Q. Who else worked on due diligence in -- in

10:23:12 addition to you, sir?

10:23:15 A. At Google, Matt Sucherman. He was an

10:23:20 in-house Google lawyer who then was in charge of our

10:23:24 corporate law group.

10:23:29 We also had some other Google lawyers

10:23:35 involved in the process. Alex MacGillivray, Glenn

10:23:44 Brown, our outside counsel was Simpson Thatcher.

10:23:52 There were at least two lawyers from there.

10:23:58 Q. How about nonlawyers who participated in

10:24:01 due diligence? I assume Credit Suisse First Boston

10:24:08 did; is that true?

10:24:10 A. They -- they didn't play as much of a role

10:24:12 in what I would call the due diligence, but in terms

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of other Google people, I know that Salar Kamangar was one of our product managers. I believe he was a VP at that time.

Q. How about Sean Dempsey?

A. Of course. I'm forgetting Sean Dempsey, who was -- worked on the corporate development team, and Salman Ullah, who was his -- his boss, who ran -- at the time, ran corporate development for Google, who reported to me.

Q. Now, is there also an individual named James Kim? That sounds familiar to you?

A. Yes.

Q. A banker at Credit Suisse?

A. (Witness nods head.)

Q. Is that correct?

A. I won't dispute that. I think that's true.

Q. Well, it may not be now, but he was then; correct?

A. That sounds correct, but I -- I don't remember him well.

Q. And did he also participate in the due diligence?

A. He may have, but I -- I don't remember his

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12:25:46 payments it should make arising out of copyright
12:25:49 litigation?
12:25:50 A. I -- I don't remember what our initial
12:25:52 position is. I remember that we agreed on a --
12:25:55 on -- on a -- what's called a -- you know, a -- a
12:26:00 cap or an amount, and expresses a percentage of the
12:26:04 purchase price.
12:26:05 Q. Now, in particular, if you'll turn to
12:26:09 page -- to the exhibit -- to the merger agreement.
12:26:15 I don't remember what exhibit number is. If you
12:26:19 would -- we'll count down for a second --
12:26:22 MS. MERINGOLO: Exhibit 2.
12:26:23 BY MR. BASKIN:
12:26:23 Q. Exhibit 2. So I understand how this
12:26:25 works, sir, if you first turn to page 61 and 62 of
12:26:34 the merger agreement --
12:26:38 MR. SCHAPIRO: Sorry. Are you giving
12:26:39 Bates numbers or the page numbers?
12:26:41 BY MR. BASKIN:
12:26:41 Q. Page numbers of the document. It would be
12:26:44 Bates numbers -123 and -124.
12:27:00 Section 9.2 sets up indemnification by the
12:27:06 company stockholders, the company being YouTube;
12:27:11 right, sir?

12:27:12 A. Yes.

12:27:12 Q. Then among the items, I -- that were to be identify -- indemnified, if you go to the top of page 62, was any indemnified copyright action, including any damages arising prior to or after the effective time; right, Mr. Drummond?

12:27:33 A. Yes, I see that.

12:27:34 Q. Now, on page 17 of the agreement, as I understand it, an escrow account was set up; right, sir?

12:27:48 A. Yes.

12:27:48 Q. And if I understand how this functioned, under the escrow account 12.5 percent of the aggregate share consideration, that is, 12.5 percent of $1.65 billion, was to be set up in an escrow account; correct?

12:28:15 A. That's correct.

12:28:16 Q. So that's roughly -- what? 200 -- $200 million was to be escrowed?

12:28:30 A. Sorry. It's 12.5 percent of -- it's -- the -- the shares.

12:28:32 Q. Okay.

12:28:33 A. This is a share deal.

12:28:37 Q. Now, then, if I'm right, if you turn to

12:28:45 page 64, and the -- and it continues on page 65,
12:29:06 Section 9.6(b) limited the actual indemnification
12:29:17 for copyright violations to 5 percent of the total
12:29:23 number of escrow shares initially deposited in the
12:29:28 escrow account; right, Mr. Drummond?
12:29:30 A. Yes, I see that.
12:29:32 Q. So then roughly do the math. You would
12:29:40 take $1.65 billion and multiply that by
12:29:46 12.5 percent, which I think is $206 million, and
12:29:53 then you would take 5 percent of that, and so the
12:29:55 initial escrowed amount for copyright violations was
12:30:02 approximately $10 million, as set forth in this
12:30:05 agreement; correct?
12:30:07 A. That would be the -- probably the better
12:30:10 reading of the language in the original agreement,
12:30:13 yes.
12:30:14 Q. Well, it's the only reading, but you --
12:30:16 there's a scrivener's error; right?
12:30:21 A. That's correct.
12:30:22 Q. And this is where the scrivener erred;
12:30:26 correct?
12:30:26 A. This is where the error took place, yes.
12:30:29 Q. Now, the net effect was --
12:30:32 Mark this as Exhibit --

THE REPORTER: 11.

MR. BASKIN: 11.

(Drummond Exhibit Number 11 was marked for identification.)

BY MR. BASKIN:

Q. Let me ask you to look at Exhibit 11, Mr. Drummond.

Does Exhibit 11 appear to you to be a -- e-mail communicating to the Sequoia folks the fully executed amendment to the merger agreement?

A. Yes, that's what it appears to be.

Q. And have you seen this prior to today, sir?

A. (No audible response.)

Q. By that, I -- by "this," I mean have you seen the amendment prior to today?

A. Yes.

Q. I'm not talking about the actual transmittal to Sequoia guys.

A. Yes, I believe I've seen the -- the amendment.

Q. Now, if I understand what happened by this amendment, Section 9.6(b) -- well, strike that.

It starts by having a couple whereas

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clauses, the second one which provides that this corrects a mutual mistake resulting from a scrivener's error; correct?

A. That's correct.

Q. And the mistake was in Section 9.6(b), as we discussed before; right, Mr. Drummond?

A. That's right.

Q. And basically, what this does, if I understand it correctly, it changes the size of the escrow available to Google for copyright infringement actions from 5 percent of the total number of escrowed shares, to 5 percent of the aggregate share price -- aggregate share consideration; is that right?

A. That's right.

Q. So now, instead of having 5 percent of approximately, I believe, $200 million available as an indemnification for copyright infringement, this amendment makes available 5 percent of $1.65 billion; correct?

A. That's correct.

Q. So basically, it increased the escrow from about $10.3 million available for copyright infringement actions to $82.5 million? Something in

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that range, sir?

A. Well, it corrected the error in the original agreement.

Q. And the effect of correcting the error was basically the indemnification flowing to Google increased by 800 percent?

A. Well, I guess I would argue it never increased. The -- the agreement was the agreement, and it was just a -- incorrectly memorialized.

Q. Now, what do you recall occasioned the discovery of the scrivener's error?

A. You know, I don't -- I don't recall who actually noticed it. It was brought to my attention, I believe, by Matt Sucherman who had worked on -- on the deal.

Q. Well, the amendment was executed, it looks like, approximately April 18th, 2007; is that correct?

A. That's what it says.

Q. And Viacom filed this lawsuit in March of 2006; is that right, Mr. Drummond?

A. That sounds generally correct. I don't know. I'd have to refer to something to -- to get that exact --

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12:35:24 Q. And was it the commencement of the Viacom litigation that occasioned the discovery of the scrivener's error?

12:35:33 A. I don't know if it was -- if it was or not.

12:35:36 Q. You have no memory of discussing with anyone why the scrivener error happened? Strike that.

12:35:48 Now, when your team was performing -- I want to move on in a second to what were some of Google Video's practices prior to the acquisition of YouTube, but before doing that, I want to return one more time to the issue of whether YouTube was monetizing or selling ads around the watch pages.

12:36:43 And let me hand you, sir, what we will mark as Exhibit 12.

12:37:11 (Drummond Exhibit Number 12 was marked for identification.)

12:37:34 BY MR. BASKIN:

12:37:35 Q. Mr. Drummond, have you seen Exhibit 12 prior to today?

12:37:40 A. I don't recall seeing it. And you'll note that it doesn't appear to have been sent to me.

12:37:47 Q. Correct.

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owners, and I was aware that EMI was one of the -- the -- the parties we were talking to.

Q. And is it a fact that YouTube was unwilling to offer this to any content owner, in and around March 2007, who did not enter into a license agreement with YouTube?

A. I don't recall what -- whether that was true in a categorical fashion. I -- what I recall is that we were going to undertake to do this with people who were working with us.

Q. Can you offer the ladies and gentlemen of the jury the name of one content owner in 2007 who did not enter into a license agreement with YouTube for whom you were willing to do audio fingerprinting?

A. No, I can't name a -- any content owner.

Q. Are you aware of any technological reason why you could not include companies that did not enter into licenses with you within audio fingerprinting?

A. I'm not a technologist, so I'm not particularly qualified to answer that question.

Q. Did you have --

A. I'm not aware of -- of whether it's

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technologically possible or impossible. I -- my guess is that it's -- well, I'm not going to guess.

Q. If Viacom was willing to provide your fingerprint vendor with its fingerprints of its videos, is there any reason Viacom could not have been included in this program, Mr. Drummond?

MR. SCHAPIRO: Objection. Calls for speculation.

THE WITNESS: I guess -- can you repeat the question?

BY MR. BASKIN:

Q. If Viacom was prepared to provide its fingerprints of its videos to Audio (sic) Magic or any other vendor that YouTube was already using, is there some reason you can think of why Viacom could not have been included in this program along with EMI?

A. At -- at what time period are you talking about?

Q. In and around March of 2007.

A. As I testified before, at that time I'm not -- I don't recall whether there would have been a reason.

As I said, we -- we were working with --

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we were willing to do these things with partners who were going to work with us. So assuming Viacom was going to work with us, we would have -- they could have availed themselves of the same thing.

Q. And by "work with" you, do you mean provide you with fingerprints, or do you mean grant you a license?

A. Work with us to provide -- provide us the content, and I don't think most -- most companies wouldn't be willing to -- to provide us the content without an agreement, but --

Q. Do you mean if Viacom -- Viacom had to agree to provide you with its content in order to avail itself of video fingerprinting? Is that what you testified?

A. At some point I believe that was true. I can't pinpoint the time.

Q. Now, if Viacom was already providing its fingerprinting to Audio (sic) Magic with respect to other websites, do you know how much it would have cost YouTube to include Viacom in the program that it allowed for EMI?

A. No, I don't, nor am I aware that Viacom was providing anything to any- -- anyone.

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15:59:01 Could you read to yourself the -- the
15:59:03 paragraph begins:
15:59:06 Deployment of such preventive measures
15:59:09 cannot be conditioned on first reaching a
15:59:12 commercial agreement.
15:59:13 Do you see that, Mr. Drummond?
15:59:39 A. Yes, I -- I've read that paragraph.
15:59:41 Q. Now, Mr. Cotton seemed to believe that it
15:59:44 was your, Google's, express policy to offer its
15:59:49 advanced technology only to copyright owners that
15:59:54 submit to YouTube's commercial demands. Was that an
15:59:59 accurate characterization of your position?
16:00:01 MR. SCHAPIRO: Objection as to what
16:00:02 Mr. Cotton believes.
16:00:04 THE WITNESS: Yeah, I don't know what
16:00:05 Mr. -- I can't comment on what Mr. Cotton believes.
16:00:08 As I stated -- as I said before, we had a -- our
16:00:12 position was that we were -- we were offering the
16:00:14 techniques that we've discussed before to help
16:00:18 content owners identify content to partners.
16:00:26 BY MR. BASKIN:
16:00:26 Q. Meaning people that entered into licenses
16:00:29 with you?
16:00:29 A. People that we -- we had business

16:00:31 relationships with.

16:00:32 Q. And if an NBC or Viacom was unwilling to

16:00:36 license their content to you --

16:00:38 A. Well, we knew that it was their view that,

16:00:40 you know, as expressed in this letter, that we

16:00:43 needed to -- to deploy this technology to meet legal

16:00:47 obligations. Obviously, we disagreed with that.

16:00:50 Q. And I take it, in fact, you did not deploy

16:00:52 the technology for either Viacom or NBC; is that

16:00:57 correct?

16:00:57 A. I don't recall that we did.

16:01:02 Q. Now, by the way, in reaching that

16:01:04 conclusion that you had no obligation to do so, was

16:01:11 that on advice of counsel, or how did you come about

16:01:15 that -- that conclusion?

16:01:15 A. It's privileged, I believe. It was on

16:01:17 advice of counsel.

16:01:36 MR. BASKIN: And I'll first direct this to

16:01:53 your attorney, but do you want to tell us which

16:01:55 counsel gave that advice that you're relying on?

16:01:59 MR. SCHAPIRO: No.

16:02:05 MR. BASKIN: Okay. Now -- after Google

16:03:33 acquired YouTube -- just one second. Oh, here it

16:04:50 is.

16:10:54 program to assist it in its take-down notice that it
16:11:00 sent to you in February 2007?
16:11:03 A. No, I wasn't aware of that, or don't
16:11:06 recall being aware of that.
16:11:09 Q. And you see where the -- apparently the
16:11:13 technical people say:
16:11:15 Technically it is do-able. It's not hard to
16:11:18 create a new content owner account and set
16:11:21 them up.
16:11:22 See that, sir?
16:11:23 A. Well, you're assuming that Matthew Liu was
16:11:27 a technical person. Since I don't know who he was,
16:11:31 I don't know that we can assume that, but I -- I see
16:11:33 the first two lines of the e-mail.
16:11:35 Q. Was there a -- intentional decision on the
16:11:38 part of Google and YouTube not to include Viacom
16:11:41 within the CYC tool in and around February 2007,
16:11:44 because it would not enter into a license agreement
16:11:48 with YouTube?
16:11:51 A. I don't recall whether it was a specific
16:11:53 decision. As I've told you before, we had a -- we
16:11:55 had a -- an approach where we were going to offer
16:11:58 this new -- the CYC tool to partners.
16:12:16 I'd like a --

16:36:53 A. Well, I -- as I sit here today, I don't have any reason to take issue with it or validate it.

16:37:04 Q. Now, if a member -- if the runner of one of these private sites or the owner of one of these private sites -- I'm not sure what the proper terminology is. Do you know what it is?

16:37:14 A. No, I don't.

16:37:16 Q. Well, why don't we agree on "operator" of one of the private sites? Is that --

16:37:21 A. That's fine.

16:37:22 Q. Okay. If the operator of one of these private sites decides to upload entire movies or television shows onto the private sites, is there any way a content owner can access these private accounts to take down those movies or TV -- television shows?

16:37:50 A. I'm not aware of ways in which they could do that.

16:37:56 Q. Now, does YouTube today use its CYC-type technology to scan private accounts for violations of either policy or copyright?

16:38:42 A. You know, I'm not -- I'm not -- I don't actually know whether we do that or not.